Department of the Treasury
Financial Crimes Enforcement Network

Ruling

FIN-2010-R001
Issued: January 16, 2009
Subject: Application of a Section 311 Special Measure to Payments under a Stand-By Letter of Credit

Dear []:

I am responding to your letter of June 2, 2008 to the Financial Crimes Enforcement Network ("FinCEN") requesting an administrative ruling on the application of section 311 of the USA PATRIOT Act to a standby letter of credit. Specifically, the standby letter of credit backs a third-party obligation to [ ] ("the 311 Foreign Bank"), a bank found to be of primary money laundering concern and subject to the imposition of the fifth special measure.[1] Specifically, you seek a determination that a one-time transfer of funds to the 311 Foreign Bank from your client, [ ] (the "U.S. Branch") under a standby letter of credit issued by the U.S. Branch to [ ] (the "Foreign Parent"), is not a violation of the fifth special measure.

You represent that [ ] (the "U.S. Company"), a customer of the U.S. Branch, entered into a commercial transaction with [ ] (the "Foreign Company") under which the Foreign Company required the U.S. Company to provide it with a bank performance guarantee. In October 2002, the U.S. Company approached the U.S. Branch, which assisted it with the operation. The U.S. Branch issued the standby letter of credit in favor of the Foreign Parent, the Foreign Parent issued the counter-guarantee in favor of the 311 Foreign Bank, and finally the 311 Foreign Bank issued the guarantee in favor of the Foreign Company.

The different but related instruments were subject to several amount increases and maturity extensions at the specific instruction of the U.S. Company. In November 2007, the U.S. Company did not choose to extend the standby letter of credit and remitted the full amount due to the U.S. Branch, to be transmitted down the instrument chain to the Foreign Company. When the U.S. Branch attempted to make payment under the standby letter of credit to the Foreign Parent, the Foreign Parent's U.S. correspondent returned the

[1] 31 C.F.R. § 103.188. The fifth special measure prohibits U.S. financial institutions from opening or maintaining a correspondent account, directly or indirectly, for the subject of a section 311.

funds as "unable to apply" because of its concerns about the prohibitions contained in the special measure.

On [ ], FinCEN issued a final rule prohibiting U.S. financial institutions from opening or maintaining a correspondent account for the 311 Foreign Bank directly or indirectly. The term "correspondent account" is defined as "an account established for a foreign financial institution to receive deposits from, or to make payments or other disbursements on behalf of, the foreign financial institution, or to handle other financial transactions related to such foreign financial institution."[2] An "account" is defined as a "formal relationship" to provide "regular services".[3]

The standby letter of credit represents a contingent obligation undertaken by the U.S. Branch for or on behalf of the U.S. Company and not for or on behalf of the 311 Foreign Bank. It does not establish an account the 311 Foreign Bank may utilize to receive deposits or make disbursements, or for the 311 Foreign Bank to receive extensions of credit. The only financial transactions conducted between the U.S. Branch and the 311 Foreign Bank under the standby letter of credit are those limited to the life cycle of the instrument – that is, in general: issuance, confirmation, negotiation, presentation of documents, extensions of maturity, changes in the underlying amount, and payment of the obligation if the documentary conditions are met.

The relationship between the U.S. Branch that issues or confirms a standby letter of credit and the 311 Foreign Bank does not constitute a correspondent account. Both the standby letter of credit and the counter-guarantee are issued, directly or indirectly, on behalf of the U.S. Company, and not on behalf of the 311 Foreign Bank. Moreover, the issuance of one standby letter of credit by the U.S. Branch does not establish a formal relationship providing regular services to the 311 Foreign Bank. The U.S. Branch did not issue, renew, or increase the amount of the standby letter of credit on its own volition, but did so only at the request, and following the specific instructions, of its direct customer, the U.S. Company. Should the U.S. Company and the Foreign Company have agreed at any time on a different type of document to implement the required performance guarantee, or on a document that required the intervention of a different bank in [country of domicile of Foreign Company], the standby – and with it arguably any contact with the 311 Foreign Bank - would have been terminated without the U.S. Branch or the Foreign Parent having any discretion on the matter.

The payment under the outstanding standby letter of credit and counter-guarantee represent the discharge of an obligation of the U.S. Branch and the Foreign Parent, respectively. This contingent obligation became effective only after the U.S. Company's

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[2] 31 CFR § 103.175(d)(1).

[3] See 31 C.F.R. § 103.175 (d)(2)(i)-(iii) (defining the term "account," respectively, for banks, broker-dealers in securities, and futures commission merchants).

exclusive decision not to extend the standby letter of credit beyond November 2007. For all the reasons above, the payments under the outstanding standby letter of credit and counter-guarantee do not violate the fifth special measure.

We would caution that, although the standby letter of credit and the counter-guarantee do not represent an arrangement to provide ongoing services to the 311 Foreign Bank and therefore are not subject to the prohibitions on opening and maintaining correspondent accounts, standby letters of credit have been identified as a type of financial instrument vulnerable to money laundering or terrorist financing abuses.[4] Therefore, a U.S. financial institution, such as the U.S. Branch, should implement appropriate policies, procedures, and controls that include monitoring payments made under a standby letter of credit to detect and report suspicious activity.[5]

This ruling is provided in accordance with the procedures set forth at 31 C.F.R. § 103.81. In arriving at our conclusions in this letter, we have relied upon the accuracy and completeness of the representations made in your letter. Nothing precludes us from reaching a different conclusion or taking further action if circumstances change or any of that information provided is inaccurate or incomplete. We reserve the right, after redacting your name and address and the [names of the companies involved], to publish this letter as guidance to financial institutions in accordance with our regulations for requesting an administrative ruling.[6] You have fourteen days from the date of this letter to identify any other information you believe should be redacted and the legal basis for redaction.

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[4] See FFIEC's Bank Secrecy Act/Anti-Money Laundering Examination Manual, Expanded Examination Overview and Procedures for Products and Services, Trade Finance Activities-Overview, page 241 (August 24, 2007).

[5] See, e.g., 31 C.F.R. 103.18 (A bank must file a suspicious activity report when it knows, suspects, or has reason to suspect that, among other things, a transaction is intended to circumvent any requirement under the Bank Secrecy Act, or any reporting requirement under federal law or regulation, or has no lawful or apparent business purpose.)

[6] 31 C.F.R. §§ 103.81-87.

If you have questions about this ruling, please contact FinCEN's regulatory helpline at (800) 949-2732.

Sincerely,

// signed //

Jamal El-Hindi
Associate Director
Regulatory Policy and Programs Division